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No. 07-1035

FILED
MAR 2 6 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

RENE S. MERSWIN,

Petitioner,

v.

THE WILLIAMS COMPANIES, INC.,

Respondent.

On Petition for a Writ of Certiorari
to the United States District Court of Appeals
for the Tenth Circuit

REPLY BRIEF FOR THE PETITIONER

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SUMMARY OF ARGUMENT

Petitioner files this Reply Brief to address Respondent's arguments in its Brief In Opposition. Petitioner argues that the lack of legal substance in Respondent's brief also underscores the necessity and importance for granting this petition to review the lower court's opinion and judgment. Respondent has not proved to this Court that the questions presented for review have ever been answered by this Court. Petitioner is cognizant of this Court's decision in *Domino's Pizza, Inc., Et Al. v. McDonald, 546 U.S. _(2006)* and the current review *CBOCS West, Inc. v. Hedrick G. Humphries, No. 06-1431.*

Petitioner argues that the pending review of *CBOCS West, Inc. v. Humphries, No. 06-1431* in the Supreme Court could or might have had a devastating effect on how circuit courts rule implicitly or explicitly in retaliation cases involving both Title VII and

Section 1981 claims. But Petitioner argues that his case clearly involves race and national origin discrimination and retaliation in the context of an **outsourcing contract** that includes the transition of affected employees and skill sets to the new service provider and **contractual relationship**.

Petitioner correctly argues in his petition that the District Court has refused to follow the ruling from the Supreme Court to review his retaliation claims in the light of *Burlington N. & Santa Fe Railway Co. v. White, 548 U.S. _(2006).* Petitioner intends to file a new case of race discrimination and retaliation pursuant to 42 U.S.C. § 1981, as amended by the Civil Rights Act of 1991 and 28 U.S.C. § 1391 before the expiration of the 4-year statute of limitations in a district court in the state of Georgia. *Jones v. R.R. Donnelley & Sons Co., 541 U.S. _(2004).*

ARGUMENT

Petitioner argues that the path to justice is so long and difficult for so many people in this great country. The evidence in this case is very clear and convincing, and Petitioner only wants to bring his case and evidence before a jury of reasonable citizens.

A. The Tenth Circuit Panel Sanctioning of the Lower Court's Departure from the Usual Course of Judicial Proceedings Calls for an Exercise of this Court's Supervisory Power.

1. The District Court entered an opinion and order on December, 4, 2006 that was clearly written by Respondent's counsel and not a Federal Court Judge, thereby avoiding its judicial duty to respond properly to a very important Civil Rights ruling from the Supreme Court. Petitioner raised this issue on appeal, but Respondent was silent on it. Petitioner does not question the lower court's discretion to adopt

respondent's proposed orders, but he would expect that the court to read all proposed opinions before signing and entering them, especially in the light of *White*. The lower court's deliberate decision to delegate its response to the Supreme Court ruling in *Burlington N. & Santa Fe Railway Co. v. White, 548 U.S. _ (2006)* to Respondent's counsel is a departure "from accepted and usual course judicial proceedings". At least, the lower court or Respondent's counsel admitted that Petitioner provided "documented evidence of [his] removal from primary Remedy role." (*See Appendix page # 20a*). In addition to a multitude of "documented evidence" combined with Petitioner's sworn affidavit, the court record also consists of Mr. Harry Green, III's affidavit of what he has witnessed during the transition process from the Respondent (The Williams Companies, Inc.) to IBM. On May 16, 2006, the parties met in Tulsa, OK and exchanged

documents requested. During Petitioner's deposition on September 6, 2006, Respondent's representatives acted in an inhumane and cruel way to damage his testimony and evidence. Petitioner believes that this Court will read the following exerts from the lower court's opinion and order (*petition Appendix pages 12a-53a*) and conclude that this was a terrible 19-page work of injustice by the author to fight against convincing and clear evidence in this case. (*portions highlighted for clarification*).

> "[I]n his response to defendant's motion for summary judgment, plaintiff points to other "**documented evidence** of [his] removal from primary Remedy role." Dkt. # 50, at 57. (App. P. 20a).
>
> "[H]owever, there is no evidence that the position to which plaintiff refers was open, that defendant sought to promote any

employee to that position, or that plaintiff applied to that position." (App. P. 35a).

"[H]is allegations, **unsupported by any evidence** that defendant sought to fill or promote any employee to Systems Analyst Staff or that plaintiff applied for that position, are insufficient to establish a prima facie case of discrimination." (App. P. 36a).

"[T]here is absolutely no evidence that, had plaintiff not been trained in PVCS and permitted to work solely on Remedy and Tele Alert, TWC would have included plaintiff on the Key Provider List or that IBM would have retained him as a regular employee." (App. P. 38a).

"[I]n fact, the **evidence** clearly indicates that the opposite is true. In his 2003 performance report, Hall noted, "Rene has also stepped up to the plate to take on additional responsibilities, such as learning [PVCS] Tracker." ***(App. P. 38a).***

"[A]s evidence, he points to a computer staff list that states his role as "secondary" with respect to the Remedy group. Dkt. #47, Ex. 15." *(App. P. 40a)*.

"[H]all's Internal Systems Cross Training Worksheet is evidence of the company's policy of ensuring that multiple employees were trained on each application. Dkt. # 50, Ex. E, Attachment 1." *(App. P. 42a)*.

"[W]ith respect to his retaliation claim, plaintiff points to much of the same evidence as described above." *(App. P. 44a)*.

"[U]ltimately, plaintiff provides no evidence, other than his personal views concerning his skills, that TWC should have included him on the Key Provider List or that TWC's exclusion from that list was due to racial animus." *(App. P. 46a)*.

"[F]inally, **plaintiff provides no evidence that** TWC's conduct was in any way causally connected to IBM's decision to terminate him in March 2005." ***(App. P. 46a).***

"[H]e filed his EEOC complaint on April 27, 2004. **There is no evidence that,** following this conduct, TWC engaged in any conduct that would persuade IBM to terminate plaintiff because of his race, national origin, or as a result of his protected conduct." ***(App. P. 47a).***

"[T]here **is no evidence** that plaintiff's ultimate termination from IBM in March 2005 was in any way linked to TWC's conduct or his protected activities in 2003 and 2004. Thus, plaintiff fails to establish a prima facie case of retaliation; defendant is entitled to summary judgment on that claim." ***(App. P. 48a).***

"[H]ere, plaintiff point to a few incidents that allegedly indicate a hostile environment and

provide circumstantial evidence of racial discrimination." *(App. P. 50a)*.

"[T]hese anecdotes are not circumstantial evidence of either discriminatory failure-to-promote or retaliation." *(App. P. 52a)*.

2. The Tenth Circuit panel sanctioned the flawed analysis of prima facie case of retaliation approved by the lower court instead of the correct standard set by another Tenth Circuit panel in response to the *White* ruling: "(1) she engaged in protected opposition to discrimination; (2) she suffered an adverse action that a reasonable employee would have found material; and (3) there is a causal nexus between her opposition and the employer's adverse action." *Antonio v. Sygma Network, Inc.*, 458 F.3d 1177, 1181 (10th Cir. 2006).

Then on August 7, 2007, another Tenth Circuit panel properly applied the same post *White* ruling or

standard in the court ruling in *Williams v. W.D. Sports, N.M., Inc., No. 05-2127* (10th Cir. 2007). So, Petitioner argues that the pending review of *CBOCS West, Inc. v. Hedrick G. Humphries, No. 06-1431* in the Supreme Court could or might have had a devastating effect on how circuit courts rule implicitly or explicitly in retaliation cases involving both Title VII and Section 1981 claims.

B. Respondent's Argument and its Lack of Legal Substance Underscore the Necessity and Importance of this Petition before the Court.

1. Respondent claims in its Brief in Opposition that "when applying *Burlington* to the undisputed facts in this case, the District Court determined that Petitioner was unable to establish a prima facie case of retaliation and..." But, according the court records, neither the lower court nor the Tenth Circuit panel even mentioned the *Burlington N. & Santa Fe*

Railway Co. v. White ruling in their respective opinions or judgments. Respondent's argument that the Tenth Circuit panel or the lower court applied *White* (assuming *Burlington* is *White*) to his Title VII claim is without any merit. It is not written in anywhere in the Tenth Circuit order and judgment or the lower court's opinion and order. The lower court's opinion focuses on *termination* from employment, while the *White* ruling recognizes that there are devastating retaliatory actions other than termination from employment.

2. Petitioner has clearly stated in his petition that the discrimination and retaliation actions to limit his employment opportunity with IBM in a new contractual relationship are similar (a 4-year statute of limitations) to the situation in *Jones v. R.R. Donnelley & Sons Co., 541 U.S. _(2004).* Petitioner intends to file a new case of race discrimination and

retaliation pursuant to 42 U.S.C. § 1981, as amended by the Civil Rights Act of 1991 and 28 U.S.C. § 1391 before the expiration of the 4-year statute of limitations in a district court in the state of Georgia.

3. Petitioner argues that his case is linked to *CBOCS West, Inc. v. Hedrick G. Humphries, No. 06-1431* with regard to his 42 U.S.C. § 1981 retaliation claim, but the Tenth Circuit panel failed to separate the claim in question from the Title VII retaliation claim. Therefore, **both** retaliation claims are before the Supreme Court for review for all the reasons stated above and in the original petition.

Finally, it would be inconceivable if a medical doctor has neglected to treat a premature **twin** because the survival of one of the two babies is questionable due to recent medical development or challenge relevant to his/her condition. In this current legal case, race retaliation under 42 U.S.C. § 1981 is

in question, but the panel of respected judges failed to recognize both retaliation claims in the light of the most recent ruling: *Burlington N. & Santa Fe Railway Co. v. White, 548 U.S. _ (2006).*

CONCLUSION

For the foregoing reasons, and those stated in the petition, the judgments of the Tenth Circuit and the lower court should be reversed.

Respectfully submitted,

Signed this 26th day of March, 2008.

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